No. 89-1822

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOVENCIO F. MADARANG and
J.F. MADARANG, D.D.S. & ASSOCIATES,
A Professional Corporation,

Petitioners,

v.

MARIANO R. BERMUDES, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF COMMONWEALTH HEALTH PLANNING AND DEVELOPMENT AGENCY, JOSE T. VILLAGOMEZ, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENTAL SERVICES, AND THE COMMONWEALTH HEALTH COORDINATING COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The United States On The Decision Of The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESPONDENTS' RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

QUESTION 1. Does the Equal Protection Clause of the Fourteenth Amendment prohibit the Commonwealth from requiring a showing of need before new health care facilities can be constructed?

QUESTION 2. Is the Petitioner denied the opportunity to practice his profession if he is not allowed to construct a dental clinic in a jurisdiction other than where he resides?

QUESTION 3. Did the Petitioner present any evidence of a violation of due process?

TABLE OF CONTENTS

Page

RESPONDENTS' QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 2

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 7

City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) 3

Community Psychiatric Centers, Inc. v. Grant, 664 F.2d 1148 (9th Cir. 1981) 5

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 491 (1970) 3, 7

Goodwin v. Oklahoma, 436 F. Supp. 583 (W.D. Okla. 1977) 5

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911) 3, 5

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) 3

Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 33 S.Ct. 441, 56 L.Ed. 730 (1913) 4

Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877) 4

Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) 2

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) 8

Personnel Administrator of Massachusetts v. Fenny, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1970) 5

Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971) 5

TABLE OF AUTHORITIES – Continued

Page

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) 7

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 4

Young v. American Mini Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) 6

STATEMENT OF THE CASE

Petitioner Madarang ("Madarang") is a dentist who is a citizen of the United States and a resident of Guam. In attempting to establish a dental clinic in the Commonwealth of the Northern Mariana Islands ("CNMI"), Madarang's professional corporation, J.F. Madarang & Associates (hereinafter with Dr. Madarang collectively refered to as "Madarang" or "Petitioner") applied for a Certificate of Need ("CON") from the CNMI.

The CNMI has a law that requires a CON before the construction and operation of any new health facility or the expenditure of more than $50,000.00 on any existing facility. The law was required by the enactment of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. Section 300k, *et seq.* (since repealed).

Public notice of the Madarang application was given, and comments were sought. Respondant Bermudes ("Bermudes"), the person designated by statute to make a recommendation to accept or reject the CON, called a public hearing. Madarang and his attorney attended the hearing, and comments were allowed from those in attendance. After all of the written and oral comments were received, Bermudes recommended to the Commonwealth Health Planning and Development Agency ("the Agency") that the application be denied. The Agency denied the application based on Petitioner's failure to show there was a need for a new dental clinic. Petitioner did not request reconsideration of the denial, but filed an action in the United States District Court for the Northern Mariana Islands. Prior to trial, the parties stipulated there

was no "need" for an additional dental clinic as that term is used in the CON law.

The District Court held that the right to work for a living is a fundamental right protected by the Fourteenth Amendment, and any law which discriminates in that area is subject to strict judicial review to determine if there is a compelling state interest to justify the discrimination. The District Court found that no compelling state interest had been shown, and struck down the CON law as unconstitutional.

The Ninth Circuit Court of Appeals reversed the District Court, holding that the right to pursue a calling is not a fundamental right for purposes of the Fourteenth Amendment. It further held that economic legislation must only have some reasonable basis, and protecting the health needs of its citizens is a reasonable activity of the CNMI government.

Petitioner timely filed his petition for a writ of certiorari to this Court.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. The CNMI may regulate economic activity by preventing duplication of health services in order to insure adequate health care for its citizens.

When an individual engages in an occupation in which the public has an interest, the state may regulate that occupation in the exercise of its police power. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). When a local economic regulation is challenged solely as

violating the Equal Protection Clause, the court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam).

The CNMI enacted its certificate of need statute to ensure proper health care for its citizens by regulating the industry to prevent an oversupply of health care facilities. In the area of economic and social welfare, a state does not violate the Equal Protection Clause merely because a classification made by its laws is imperfect. *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 491 (1970). If a classification has some reasonable basis, it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377 (1911). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399 (1961).

There is no question that Respondents met the requirements contained in regulations promulgated to implement the CON statute. Petitioner filed for a CON and a hearing was held pursuant to the CON statute. Input was received from other health professionals and a recommendation was made to the Agency, whose responsibility it was to determine if the certificate should be granted. After consideration and review of the evidence, the Agency made a determination that there was no need for a new dental clinic, and denied Petitioner's application. In fact, the Petitioner stipulated prior to trial that

there was no "need" as that term is defined in the CON statute.

To accept Petitioner's position, this Court would have to find that any CON statute violates the Fourteenth Amendment if such statute prevents an individual from constructing and operating a private business such as a dental clinic. It would further have to conclude that statutory regulation may not reflect a state's legitimate interest in ensuring the well being of its citizens through adequate and properly run dental clinics if such regulation would prevent one person or organization from constructing a health care facility. Such a determination would require a regulatory system without an adverse impact on anyone – in short, a perfect system. Government regulation of economic activity does not require perfection. "The problems with government are practical ones and may justify, if they do not require, rough accommodations---illogical, it may be, and unscientific." *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 56 L.Ed. 730 (1913).

The prohibition of the Equal Protection Clause goes no further than invidious discrimination. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). There was no showing that Petitioner was treated differently than any other applicant. Therefore, no invidious discrimination toward the Petitioner can be demonstrated. "For protection against abuses by legislatures, the people must resort to the polls, not the courts." *Williamson*, 348 U.S. at 488, 75 S.Ct. at 465, 99 L.Ed. at 572 (citing *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1877)).

The cornerstone of any equal protection challenge must be a showing of disparate treatment. *Personnel Administrator of Massachusetts v. Fenny,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1970). No disparate treatment has been shown in this case. No other applications for certificates of need had been filed at the time of Petitioner's application. There can be no evidence of disparate treatment because there can be no comparison with any other application.

In addition to acting to insure adequate healthcare, the CNMI was following the dictates of the federal government in applying for federal hospital funds pursuant to 42 U.S.C. § 300k *et seq.,* which required a CON statute before funds would be distributed. Other courts have upheld CON statutes passed in order to collect these federal funds. See, *e.g., Community Psychiatric Centers, Inc. v. Grant,* 664 F.2d 1148 (9th Cir. 1981); *Goodwin v. Oklahoma,* 436 F. Supp. 583 (W.D. Okla. 1977), citing *Richardson v. Belcher,* 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

> The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police law, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

Lindsley, 220 U.S. at 78, 31 S.Ct. at 340, 55 L.Ed. 377.

The CNMI is granted the discretion to enact laws regulating economic activities which have rational basis. If the number of health care facilities are not regulated, duplication of services and equipment can occur. Although it may be argued competition might produce

benefits in the short run, the legislature found it would more likely prevent health care facilities from accumulating sufficient revenues to purchase increasingly costly but medically important health care technology. Unfettered competition may result in outdated medical equipment and techniques within the CNMI. Protecting the health and welfare of the CNMI population by ensuring adequate and secure health services is of paramount concern and constitutes, at the very least, a rational basis for the CON law.

B. Petitioner presented no evidence that he could not practice his profession either in the CNMI or Gaum.

Petitioner did not present any evidence that he was denied the opportunity to practice his profession in the CNMI. His argument is simply that he could not construct a dental clinic. There are two dental clinics presently operating in Saipan, by far most populous island in the CNMI. Both clinics were operating before the CON statute was enacted. Petitioner did not present any evidence that he was refused employment with the other dental clinics. He simply makes an illogical leap that because he could not construct a dental clinic, he could not practice his profession.

Such an argument is akin to an attorney arguing that if he can not construct a law office, he cannot practice law. Many governmental entities enact legislation which regulates or prohibits certain types of construction, such as zoning regulations restricting commercial office buildings or those that prevent certain types of businesses from operating in particular locations. *Young v. American*

Mini Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). If there are too many office buildings in a particular location, a government can place a moratorium on construction, even if the result is that a group of people are denied the right to practice their chosen profession in that area. See, *e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

A rational basis test is applied to state legislation restricting the availability of employment opportunities. *Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1162, 25 L.Ed.2d at 502. Petitioner may still practice his profession on Guam and, in the absence of a showing that he cannot secure employment in any other dental clinic in the CNMI, it may be presumed he can also practice his profession in the CNMI. Even if a person is denied employment, if he is free to seek another job, due process has been met. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

C. Petitioner received both notice and a hearing, and was accorded full due process rights.

When Petitioner first filed his application for a CON, the information provided therein was inconsistent. Mr. Burmudes, as acting executive director of the Agency, was designated by statute to receive and review each application, and make a recommendation based on the information supplied plus comments solicited from the appropriate agencies and the public. A notice that the application had been filed and that a hearing was to be held was published in the local newspaper.

Petitioner and his attorney attended the public hearing. Questions were asked of the Petitioner, and testimony from others in attendance was taken. After all the evidence was received, the application was denied because there was no showing of need for another dental clinic. The steps leading to that determination, however, afforded Petitioner full procedural due process.

Economic regulation of professional services need not violate substantive due process. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973). As stated by the Ninth Circuit Court of Appeals in this case, the nature of the purported violation of substantive due process is not specified by either the Petitioner or the District Court, and none appears from the record. The days when courts regularly and automatically struck down economic legislation on substantive due process grounds have long since passed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioner's application for a Writ of Certiorari.

Respectfully submitted,

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